

ISSUE DATE: February 4, 1998

DOCKET NO. P-407/M-97-1675

ORDER REJECTING INTERCONNECTION AGREEMENT

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Edward A. Garvey
Joel Jacobs
Marshall Johnson
LeRoy Koppendrayer
Gregory Scott

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of an Application by
Duluth/Superior Cellular, Inc.,
Bunyan Cellular Corporation, and Cellular
Information Systems of Pine Bluff, Inc. and
Contel of Minnesota, Inc.

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AGREEMENT

PROCEDURAL HISTORY

On November 20, 1997, Contel of Minnesota, Inc., d/b/a GTE Minnesota (GTE) and Duluth/Superior Cellular, Inc., d/b/a CellularOne of the Northland; Bunyan Cellular Corporation, d/b/a CellularOne of the Northlakes and d/b/a CellularOne of Central Minnesota, and Cellular Information Systems of Pine Bluff, Inc., d/b/a CellularOne of Central Minnesota (collectively, "CellularOne") jointly filed a negotiated interconnection agreement for Commission review under 47 U.S.C. § 252(e).

On December 1, 1997, the Department of Public Service (the Department) filed comments recommending that the Commission reject the agreement. The Department stated that the contract terms are fatally defective because they do not acknowledge that the Commission is a third party beneficiary of the contract on behalf of the public. The Department recommended that the Commission require the addition of the following language to Section 34 of the contract:

The parties recognize the Commission considers itself a third party beneficiary on behalf of the public. Accordingly, the Parties agree to give notice to the Commission of any lawsuits or other proceedings that involve or arise under this Agreement.

On December 11, 1997, GTE filed reply comments. GTE stated that it agrees with the principle that parties should give notice to the Commission of any lawsuit or other proceeding arising out of the contract. This principle, however, should be included in the contract in a manner consistent with the Commission's precedent in previous interconnection approval proceedings. GTE suggested that the following language be included at the end of Section 34 of the contract:

Notwithstanding the foregoing, the Parties agree to give notice to the Minnesota Public Utilities Commission of any lawsuits or other proceedings that involve or arise under the Agreement to ensure that the Commission has the opportunity to seek to intervene in these proceedings on behalf of the public interest.

On December 22, 1997, CellularOne filed comments joining and adopting GTE's December 11, 1997 reply comments.

On January 27, 1998, the matter came before the Commission for consideration.

FINDINGS AND CONCLUSIONS

I. THE APPLICABLE LAW

The federal Telecommunications Act of 1996 is designed to open the nation's telecommunications markets to competition, using three strategies:

- 1) requiring incumbent local exchange carriers to permit new entrants to purchase their services wholesale and resell them to customers.
- 2) requiring incumbent local exchange carriers to permit competing providers of local service to interconnect with their networks on competitive terms; and
- 3) requiring incumbent local exchange carriers to unbundle the elements of their networks and make them available to competitors on just, reasonable, and nondiscriminatory terms.

47 U.S.C. § 251(c).

Under the Act, new market entrants are to seek agreements on these issues with incumbent local exchange carriers, who are required to negotiate in good faith. 47 U.S.C. §§ 251(c), 252(a)(1), 252(b)(5). All agreements reached must be submitted to the state commission for approval. 47 U.S.C. § 252(a) and (e).

The state commission is to approve or reject these agreements, making written findings as to any deficiencies. 47 U.S.C. § 252(e)(1). Negotiated agreements may be rejected for the following reasons: (1) they discriminate against a telecommunications carrier who is not a party to the agreement; (2) implementing them would be inconsistent with the public interest, convenience, and necessity; (3) they conflict with any valid state law, including any applicable intrastate service quality standards or requirements. 47 U.S.C. § 252(e)(2) and (3).

The Act also requires local exchange carriers to provide interconnection, services, and network elements to any requesting telecommunications carrier on the same terms and conditions found in any state commission-approved agreement to which the incumbent carrier is a party. 47 U.S.C. § 252(i).

II. COMMISSION ACTION

The Commission agrees with GTE that its proposed language adequately addresses the issues raised by the Department in its recommendations regarding Section 34 of the contract. The Commission will reject the contract based on the existing language defect, while noting that resubmission of the contract, revised to include GTE's proposed language, will cure the defect.

The Commission also notes another defect which compels rejection of the contract: Section 12.3 of the contract, which covers arbitration, does not contain language providing for Commission review of an arbitrator's decision.

The Commission will require the parties to file a new agreement addressing the deficiencies or to inform the Commission that they will not do so within two weeks of the date of this Order.

These actions are explained below.

A. Deficiencies Requiring Rejection of the Contract

1. Section 12.3--Arbitration

a. The Contract Provision

This section of the contract provides that claims or disputes not settled through negotiation will be resolved by binding arbitration and establishes the basic time frames and procedures for the arbitration. Section 12.3 ends with the sentence: "Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction."

b. Commission Action

In recent decisions on arbitration agreements, the Commission has found contracts deficient because they did not contain language acknowledging the Commission's ongoing authority to enforce arbitration agreements, including the authority to reject or modify the independent arbitrator's decision.¹ The Commission continues to find that the absence of language clarifying this authority is inconsistent with the public interest and warrants rejection of the proposed agreement.

The Commission notes that the addition of the following underlined language to the end of

¹ See, for example, In the Matter of the Petition of US WEST for Approval of an Interconnection Agreement between US WEST Communications, Inc. and Access Network Services, Inc. for Service under the Telecommunications Act of 1996, Section 252(e), Docket No. P-5240,421/M-97-1180, ORDER REJECTING AGREEMENT, SPECIFYING CHANGES, AND REQUIRING REFILE (October 17, 1997).

Section 12.3 would cure the contract defect and render the agreement acceptable to the Commission:

Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction. The parties shall submit a copy of each arbitration opinion to the Commission, the Department of Public Service, and the Office of Attorney General, Residential and Small Business Utilities Division. The arbitrator's decision shall remain in effect unless the Commission acts to suspend, modify, or reject the decision within 45 days.

This language acknowledges the Commission's ongoing duty and authority to monitor the implementation of the interconnection agreement and the provision of service under it. The added language also establishes a process by which the Commission will receive the necessary notice of any arbitrator's decision.

2. Section 34--No Third Party Beneficiaries

a. The Contract Provision

This provision states that the agreement does not grant third parties any remedy, claim, liability, reimbursement, cause of action, or other right or privilege, except as may be specifically set forth in the agreement.

The Department recommended inclusion of language acknowledging that the Commission "considers itself a third party beneficiary on behalf of the public" and requiring notice to the Commission of any lawsuits or other proceedings related to the agreement.

b. Commission Action

In recent decisions, the Commission has found that the inclusion of the arbitration review language discussed in the preceding section of this Order, together with notice provisions allowing the Commission to intervene in other proceedings as necessary, eliminate the need for language acknowledging the Commission as a third party beneficiary. In a September 29, 1997 interconnection agreement decision², the Commission stated:

The parties' agreement to arbitrate disputes arising under the contract, together with the Commission's ultimate authority over arbitrators' decisions, eliminates the need for

² In the Matter of the Petition of AT&T Wireless Services, Inc. for Arbitration of an Interconnection Agreement with US WEST Communications, Inc., Pursuant to 47 U.S.C. § 252(b), Docket No. P-421/EM-97-371, ORDER RESOLVING ISSUES AFTER RECONSIDERATION, EXAMINING INTERCONNECTION AGREEMENT, AND REQUIRING COMPLIANCE FILING.

stronger third party beneficiary language in this case. The Commission will, however, require the addition of another notice provision to ensure that any administrative, quasi-judicial, or other proceeding on the contract comes to the Commission's attention promptly. That provision will read as follows:

Notwithstanding the foregoing, parties agree to give notice to the Public Utilities Commission (MPUC) of any lawsuits or other proceedings that involve or arise under the agreement to ensure the MPUC has the opportunity to seek to intervene in these proceedings on behalf of the public interest.

Order at p. 11.

In this case, GTE and CellularOne have proposed including the above-noted contract language in their agreement. The Commission finds that this approach is consistent with its previous decisions and ensures that the Commission can continue to act on behalf of the public interest during the life of the agreement.

The Commission will therefore not require contract language naming the Commission as a third party beneficiary, as requested by the Department, but will require inclusion of the above notice provision in Section 34.

B. Expedited Approval Process for Revised Contract

It is important that the parties be permitted to begin performance under a revised interconnection agreement as soon as possible. The Commission will therefore delegate to the Executive Secretary the authority to examine any revised interconnection agreement filed by the parties, to confirm that the deficiencies noted in this Order have been corrected as recommended herein, and to issue a letter to the parties permitting the contract to go into effect as of the date of filing.

ORDER

1. The Commission rejects the CellularOne/GTE interconnection agreement for the reasons stated in this Order.
2. Within two weeks of the date of this Order, the parties shall file a new agreement correcting the deficiencies and modifying the agreement as noted above, or a statement explaining that they will not be making such a filing.
3. The Commission delegates to the Executive Secretary the authority to examine any revised interconnection agreement filed by the parties, to confirm that the deficiencies noted in this Order have been corrected as recommended herein, and to issue a letter to the parties approving the contract as of the date of filing.
4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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